(2)

Supreme Court, U.S.
FILED
NOV 9 1993
OFFICE OF THE CLERK

CASE NO. 93-619

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

R. WILLIAM GRAHAM,

Petitioner,

v.

MARCIA J. MENGEL, CLERK OF THE SUPREME COURT OF OHIO AND SECRETARY OF THE OHIO BOARD OF BAR EXAMINERS; MEMBERS OF THE SUPREME COURT OF OHIO; AND MEMBERS OF THE STATE OF OHIO BOARD OF BAR EXAMINERS,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

---

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI

ATTORNEY GENERAL LEE FISHER
By: David C. Greer (0009090)
Special Counsel
400 National City Center
6 North Main Street
Dayton, Ohio 45402
(513) 223-3277
Counsel of Record

Loren L. Braverman (0015144)
Deputy Chief Counsel
30 E. Broad St., 17th Floor
Columbus, Ohio 43266-0410

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

BEST AVAILABLE COPY

15 pp

QUESTION PRESENTED

Whether the Supreme Court of Ohio erred in determining that it lacked original jurisdiction under the Ohio State Constitution to determine the Petitioner's claim for monetary, declarative, and injunctive relief or in otherwise dismissing the case.

TABLE OF CONTENTS

	Page
Question Presented	I
Table of Authorities	IV
Opinions Below	1
Constitutional and Statutory Provisions Involved	2
Statement of the Case	3
Summary of the Agrument	5
Argument	6
Conclusion	8

TABLE OF AUTHORITIES

Page

Constitutional and Statutory Provisions,
Ohio Const. Art. IV § 2(B)(1) (amended 1968) 6

Cases

Christensen v. *Board of Comm'rs on Grievances and Discipline*, 61 Ohio St.3d 534 (1991) 7

Regents of the University of Michigan v. *Ewing*, 474 U.S. 213 (1985) 7

State ex rel. Coyne v. *Todia*, 45 Ohio St.3d 232 (1989) 7

State ex rel. v. *Indus. Comm'n of Ohio*, 139 Ohio St. 303 (1942) 6

CASE NO. 93-619

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

R. WILLIAM GRAHAM,

Petitioner,

v.

MARCIA J. MENGEL, CLERK OF THE SUPREME COURT OF OHIO AND SECRETARY OF THE OHIO BOARD OF BAR EXAMINERS; MEMBERS OF THE SUPREME COURT OF OHIO; AND MEMBERS OF THE STATE OF OHIO BOARD OF BAR EXAMINERS,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

---

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Respondent's Appendix A sets forth the initial Entry of Dismissal by the Supreme Court of Ohio. The remainder of the relevant Opinions are adequately set forth in the Petitioner's Brief.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The full text of **Ohio Const.** art. IV § 2(B)(1) is set forth in the Respondent's Appendix B. The remainder of the relevant statutes are adequately set forth in the Petitioner's Brief.

STATEMENT OF THE CASE

A. PROCEDURAL POSTURE

R. William Graham, the sole petitioner, failed the July, 1990, Ohio Bar Examination. He and two other unsuccessful applicants, who have subsequently re-taken and passed the bar examination and who have not joined in this petition, filed a lawsuit which was dismissed by the United States District Court for the Southern District of Ohio on November 29, 1990, for lack of subject matter jurisdiction. (Petitioner's Appendix E). The United States Court of Appeals for the Sixth Circuit affirmed this decision in an unpublished decision on February 3, 1993. (Petitioner's Appendix D). This Court denied certiorari on June 21, 1993. (Petitioner's Appendix C).

In the meantime, Graham filed this lawsuit in the Supreme Court of Ohio allegedly under that Court's original jurisdiction. The Ohio Supreme Court on April 21, 1992, entered an Order dismissing the Complaint to the extent that it sought damages and injunctive relief, which are outside of the Court's jurisdiction. (Respondents' Appendix A). While the Court dismissed the Defendants from the case, it initially retained the remainder of the Complaint as an application for it to exercise its original jurisdiction over the admission to practice law and to render a Declaratory Judgment with regard to the constitutionality of procedures followed in connection with the July, 1990, Ohio Bar Examination. (Respondents' Appendix A). Subsequently, the Court dismissed this case sua sponte for want of jurisdiction. (Petitioner's Appendix A). The Petitioner is now asking this Court to review the Ohio Supreme Court's interpretation of its original jurisdiction under Article IV, Section 2 of the Ohio Constitution.

A third complaint involving the same subject matter was filed by the Petitioner in the Ohio Court of Claims and is presently pending.

B. STATEMENT OF FACTS

The relevant facts were carefully articulated in the findings of the District Court in its Dismissal Order after trial. (Petitioner's Appendix E). The fact which Petitioner finds upsetting is that one of the twelve bar examiners was more stringent than the other eleven. (R. William Graham at Tr. 29-30, 37-39, 47-49).

It was unequivocally established before the District Court that the examiner in question was conscientious in his grading, that he carefully and thoughtfully exercised his professional judgment in his performance of his assigned tasks, that he gave high grades to the same applicants who received high grades from other examiners, that he gave low grades to the same applicants who received low grades from other examiners (Stephen P. Klein at Tr. 142, 144), that he had an impressive professional background and extensive experience in evaluating basic legal skills as expressed in the written work of young lawyers (Leslie W. Jacobs at Tr. 186-187), that he articulated and consistently applied an intelligent set of criteria for evaluating the essays he was assigned to grade (Leslie W. Jacobs at Tr. 194-196), and that he devoted one hundred twenty-five hours of his life and professional judgment to his assigned task. (Leslie W. Jacobs at Tr. 196). It was also established that every successful applicant who did not obtain a shortcut to success through the presumptive pass phase of the examination had his or her examination efforts subjected to precisely the same scrutiny from the examiner in question as were the Petitioner's efforts. (Stephen P. Klein at Tr. 144). In Ohio, an unsuccessful applicant has an unlimited right to re-take the bar examination.

SUMMARY OF ARGUMENT

The issues presented by the Petitioner relate exclusively to the interpretation of the jurisdiction of the Ohio Supreme Court under the Ohio Constitution.

The Supreme Court of Ohio correctly determined on April 22, 1992, that it was without jurisdiction to award damages or injunctive relief to the Petitioner and therefore it dismissed the Defendants from the case. At the same time, the Court retained the case for Declaratory Judgment on the constitutional issue. (Respondents' Appendix A).

The Supreme Court of Ohio correctly determined on July 14, 1993, that the case should be dismissed for want of jurisdiction. (Petitioner's Appendix A). While the opinion was silent as to the basis for its determination, Article IV, Section 2 of the Ohio Constitution furnishes two independent bases. First, the Petitioner should have proceeded in mandamus rather than seeking a declaratory judgment. Second, the Petitioner's assertions, in view of the evident exercise of professional judgment in the administration of the bar examination and the Petitioner's unlimited right to retake the examination, raised no substantial constitutional issue.

ARGUMENT

The original jurisdiction of the Supreme Court of Ohio is defined exclusively by the Ohio Constitution as limited to the following categories of cases:

(a) Quo Warranto;

(b) Mandamus;

(c) Habeas Corpus;

(d) Prohibition;

(e) In any cause on review as may be necessary to its complete determination; and

(f) Admission to the practice of law, discipline of persons so admitted, and all other matters relating to the practice of law.

Ohio Const. art. IV, § 2(B)(1) (amended 1968).

In its original order of April 22, 1992, the Supreme Court of Ohio dismissed the Petitioner's actions for monetary and injunctive relief. (Respondent's Exhibit A). It had previously articulated this interpretation of its original jurisdiction. *State, ex rel. Smith* v. *Indus. Comm'n of Ohio*, 139 Ohio St. 303, 39 N.E.2d 838 (1942) (Syll. 1). The Court noted the distinction between injunctive relief and a writ of mandamus, and found that only the latter properly invokes the Court's original jurisdiction. *Id.* at 307-08. Thus, the order of April 22, 1992, was correct in dismissing the claim for monetary and injunctive relief, and in dismissing the Defendants from the case. (Respondents' Exhibit A). Indeed, nowhere in his brief, does the Petitioner dispute this order. The only issue presented is the propriety under the Ohio Constitution of the Court's subsequent dismissal of the declaratory judgment aspect of the case for want of jurisdiction. (Petitioner's Exhibit A).

The Petitioner should have proceeded in mandamus rather than seeking a declaratory judgment if he desired to invoke

the jurisdiction of the Ohio Supreme Court. It is well settled in Ohio that the Supreme Court has no original jurisdiction to decide declaratory actions. *State ex rel. Coyne* v. *Todia*, 45 Ohio St.3d 232, 237, 543 N.E.2d 1271 (1989). This result is the same even though the Petitioner nominally sought to invoke the Court's original jurisdiction in matters pertaining to the bar.

> Although only this Court may make rules governing the conduct of judges and attorneys, it does not follow, as argued by relators, that only we may determine their constitutionality. Rules adopted by this court in an administrative capacity must comply with the state and federal constitutions like any other rules and may be tested in any court of competent jurisdiction. In this case, the relators are, in reality, seeking a declaratory judgment. However this Court has no jurisdiction to consider an action for declaratory judgment.

Christensen v. *Board of Comm'rs on Grievances and Discipline of the Supreme Court of Ohio*, 61 Ohio St.3d 534, 537, 575 N.E.2d 790 (1991).

The successive orders of the Supreme Court could also be construed to mean that the Supreme Court had determined that the Petitioner's constitutional claims are utterly without substantive merit and that no genuine case or justiciable controversy within its interpretation of its own jurisdiction was presented. The material before the Ohio Supreme Court demonstrated no substantial departure from accepted academic norms or any basis for an argument that the Court through its Board of Bar Examiners did not actually exercise professional judgment. It likewise demonstrated that the Petitioner, despite his failing grade on the July 1990 examination, had an unlimited right to retake the examination. *See Regents of the University of Michigan* v. *Ewing*, 474 U.S. 213 (1985).

In any event, the Petitioner's invitation for this Court to undertake an interpretation of the Ohio Constitution's grant

of original jurisdiction to the Ohio Supreme Court is not an invitation that this Court should accept. The Petitioner's third lawsuit remains pending in the Ohio Court of Claims. If he disputes whatever rulings he may receive in that Court, the appellate path lies open to him. The fact that he has not successfully invoked the original jurisdiction of the Supreme Court of Ohio does not necessarily mean that he has exhausted his state remedies including the always available remedy of retaking the bar examination — a remedy which he has refused to consider on any of the six occasions it has been offered since he elected to take his failing grade to court.

CONCLUSION

This case presents no federal constitutional issue for this Court's consideration, and this Court should defer to the determination by the Ohio Supreme Court of its own original jurisdiction under Article IV, Section 2 of the Ohio Constitution.

Respectfully submitted,

ATTORNEY GENERAL LEE FISHER
By: David C. Greer #0009090
Special Counsel
400 National City Center
6 North Main Street
Dayton, Ohio 45402-1908
(513) 223-3277
Counsel of Record

Loren L. Braverman (0015144)
Deputy Chief Counsel
30 E. Broad St., 17th Floor
Columbus, Ohio 43266-0410

APPENDIX A

THE SUPREME COURT OF OHIO
1992 TERM
To wit: April 21, 1992

Case No. 92-566

R. William Graham,

Plaintiff,

v.

Marcia Mengel, et al.,

Defendants.

ENTRY

This cause originated in this Court on the filing of a complaint for damages, declaratory and injunctive relief. Upon consideration thereof,

IT IS ORDERED by the Court, *sua sponte*, that this cause is dismissed to the extent that the complaint seeks damages and injunctive relief, both of which are outside the jurisdiction of this Court, and that the defendants are thereby also dismissed.

IT IS FURTHER ORDERED by the Court that the remainder of the complaint shall be retained and considered an application under the Ohio Constitution, Article IV, Section 2(B)(1)(g), for this Court to exercise its original jurisdiction over admission to the practice of law and to render a declaratory judgment with regard to the constitutionality of procedures followed in connection with the July 1990 Ohio Bar Examination.

IT IS FURTHER ORDERED that plaintiff shall file his brief on the merits on or before May 21, 1992.

/s/ A. WILLIAM SWEENEY
Acting Chief Justice

APPENDIX B

Ohio Const., Art. IV, § 2(B)(1)

The Supreme Court shall have original jurisdiction in the following:

(a) Quo warranto;
(b) Mandamus;
(c) Habeas corpus;
(d) Prohibition;
(e) Procedendo;
(f) In any cause on review as may be necessary to its complete determination; and
(g) Admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law.